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contribution and indemnity should be the same. This understanding is substantially consistent with the subsequently amended CPLR 1402, which precludes the enforcement of a *Dole* claim for contribution until the party has paid more than his apportioned share of liability.[223] Accordingly, *Adams* is not at all incongruous with the practicalities and fairness embodied in the recent modification of section 1402.

Intrafamily Torts

In *Lastowski v. Norge Coin-O-Matic, Inc.*[224] and *Ryan v. Fahey*,[225] the Second and Fourth Departments of the Appellate Division endorsed a recent Third Department decision, *Holodook v. Spencer*,[226] concerning intrafamily torts. Considering the question of whether a parent owes a legal duty of supervision to his child, with a cause of action accruing to the injured child upon a breach of such duty, both courts answered in the negative. In light of *Dole*, the conclusion that such a claim is impermissible is of particular importance.[227]

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223 CPLR 1402, as amended, reads as follows:

> Amount of contribution. The amount of contribution to which a person is entitled shall be *the excess paid by him over and above his equitable share of the judgment recovered by the injured party;* but no person shall be required to contribute an amount greater than his equitable share. The equitable share shall be determined in accordance with the relative culpability of each person liable for contribution.

1 N.Y. SESS. LAWS [1974], ch. 742, § 1 (McKinney) (emphasis added). Prior to the enactment of article 14, the Supreme Court, Kings County, in Mazelis v. Wallerstein, 77 Misc. 2d 335, 353 N.Y.S.2d 633 (Sup. Ct. Kings County 1974), held that to the extent one of the defendants pays more than his apportioned share of liability, he may bring an action for contribution. *Id.* at 340, 335 N.Y.S.2d at 639.

224 44 App. Div. 2d 127, 355 N.Y.S.2d 432 (2d Dep't 1974).

225 43 App. Div. 2d 429, 352 N.Y.S.2d 283 (4th Dep't 1974).

226 43 App. Div. 2d 129, 350 N.Y.S.2d 199 (3d Dep't 1973), *discussed in The Survey*, 48 ST. JOHN'S L. REV. 611, 650 (1974). In *Holodook*, a four-year-old infant, while running between parked cars, was struck by the defendant's automobile. The Supreme Court, Columbia County, denied a motion to dismiss the defendant's counterclaim against the infant's father and a third-party action against the infant's mother, both of which involved requests for *Dole* apportionments. 73 Misc. 2d 181, 340 N.Y.S.2d 311 (Sup. Ct. Columbia County 1973). With one judge dissenting, the Appellate Division, Third Department, reversed, holding the *Dole* claims to be legally insufficient. 43 App. Div. 2d at 137, 350 N.Y.S.2d at 206.

In a companion case, Graney v. Graney, 43 App. Div. 2d 207, 350 N.Y.S.2d 207 (3d Dep't 1973), the Third Department affirmed a trial court order dismissing a direct child-parent suit based upon a claim of negligent supervision.

227 Where negligent supervision of an infant is alleged, the claimant is essentially arguing that the parent had failed to supervise and protect the injured infant, thereby contributing to his injury. The existence of such a theory has been the subject of a great deal of judicial scrutiny. *See, e.g.*, Sorrentino v. United States, 344 F. Supp. 1308 (E.D.N.Y. 1972) (claim allowed); Northrop v. Hogstyn, 75 Misc. 2d 486, 348 N.Y.S.2d 106 (Sup. Ct. Ontario County 1973) (claim disallowed); Searles v. Dardani, 75 Misc. 2d 279, 347 N.Y.S.2d 662 (Sup. Ct. Albany County 1973) (claim allowed). *See generally* Dachs, Seider v. Roth *Upstaged by* Dole v. Dow Chemical, 169 N.Y.L.J. 22, Jan. 31, 1973, at 1, col. 5; McLaughlin, *New York Trial Practice*, 169 N.Y.L.J. 92, May 11, 1973, at 1, col. 1.

In *Ryan*, the hand of the three-year-old plaintiff was run over by a lawnmower operated by a neighbor's child. At the time of the accident, the plaintiff's mother and the neighbor were in the latter's home. Acting in both an individual and representative capacity, the father of the injured infant brought a negligence action against the infant's mother, the neighbor, and the neighbor's son. The negligence of the two adult defendants allegedly consisted of their failure to properly supervise their children. Reversing the Supreme Court, Monroe County, the Fourth Department upheld the motion made by the mother of the infant plaintiff to dismiss the complaint for failure to state a cause of action.[228]

In *Lastowski*, the father of an infant commenced an action to recover for injuries sustained by the child in an automobile accident involving a vehicle owned by the defendant. Seeking a *Dole* apportionment of damages, the defendant counterclaimed against the father, contending that the infant's injuries were due to negligent parental supervision. The Second Department granted the father's motion to dismiss the counterclaim, holding that the defendant had failed to allege an actionable tort.[229]

Both the *Ryan* and *Lastowski* courts determined that despite abolition of the intrafamily tort immunity doctrine in *Gelbman v. Gelbman*,[230] no tort of negligent supervision currently exists.[231] Furthermore, no such tort had been recognized prior to adoption of the intrafamily immunity rule in *Sorrentino v. Sorrentino*.[232] In so holding, both courts referred to Judge Burke's conclusion in *Gelbman* that by "abolishing the defense of intrafamily tort immunity for nonwillful torts, we are not creating liability where none previously existed. Rather, we are permitting recovery, previously denied, after liability

228 43 App. Div. 2d at 433, 352 N.Y.S.2d at 287. At trial, the defendant-neighbor cross-claimed against the defendant-mother, seeking a *Dole* apportionment of damages. The sufficiency of this cross-claim was not decided by the Fourth Department. *Id.* at 431, 352 N.Y.S.2d at 285.

229 44 App. Div. 2d at 128, 355 N.Y.S.2d at 433.

230 23 N.Y.2d 434, 245 N.E.2d 192, 297 N.Y.S.2d 529 (1969). In *Gelbman*, a plaintiff injured in an automobile accident brought suit against her 16-year-old son, the operator of one of the motor vehicles involved in the collision. Relying in large measure upon the dissenting opinion of Judge Fuld in Badigian v. Badigian, 9 N.Y.2d 472, 174 N.E.2d 718, 215 N.Y.S.2d 35 (1961), the Court of Appeals held that henceforth intrafamily suits for nonwillful torts would be recognized in New York. 23 N.Y.2d at 438, 245 N.E.2d at 193, 297 N.Y.S.2d at 531. In reaching this conclusion, the Court specifically overruled the decision that had introduced the intrafamily tort immunity rule, Sorrentino v. Sorrentino, 248 N.Y. 626, 162 N.E. 551 (1928).

231 Ryan v. Fahey, 43 App. Div. 2d 429, 433, 352 N.Y.S.2d 283, 286 (4th Dep't 1974); Lastowski v. Norge Coin-O-Matic, Inc., 44 App. Div. 2d 127, 131, 355 N.Y.S.2d 432, 436 (2d Dep't 1974).

232 248 N.Y. 626, 162 N.E. 551 (1928).

has been established."[233] In firmly asserting the nonexistence of a negligent supervision tort, the two courts rejected earlier trial level opinions which had suggested that recovery might be had if special circumstances concerning the injured infant were alleged, such as mental or physical disability, or *non sui juris* status.[234]

Dissenting in *Lastowski*, Justice Hopkins contended that with the complete abrogation of intrafamily tort immunity in *Gelbman*, the sole bar to the assertion of a cause of action grounded upon negligent supervision had been removed.[235] Accordingly, he argued that negligent supervision is an actionable tort and suggested that a "reasonable parent"[236] standard be imposed as the criterion for determining whether the duty of supervision has been breached.

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233 23 N.Y.2d at 439, 245 N.E.2d at 194, 297 N.Y.S.2d at 532.

234 *See, e.g.*, Miller v. Cross, 75 Misc. 2d 940, 349 N.Y.S.2d 598 (Sup. Ct. Orange County 1973); Kierman v. Jones, 73 Misc. 2d 829, 342 N.Y.S.2d 873 (Sup. Ct. Nassau County 1973); Fake v. Terminal Hardware, Inc., 73 Misc. 2d 39, 341 N.Y.S.2d 272 (Sup. Ct. Albany County 1973).

In *Miller*, the Supreme Court, Orange County, observed:

> If a child is alleged to have been 4 years old or below at the time of the accident and therefore *non sui juris* as a matter of law, the age of the child is in and of itself a special circumstance which creates a special responsibility for a parent to supervise and therefore also creates a recognizable cause of action over against the parent under Dole v. Dow . . . .

75 Misc. 2d at 940-41, 349 N.Y.S.2d at 599.

235 Justice Hopkins concluded that prior to adoption of the intrafamily tort immunity doctrine in Sorrentino v. Sorrentino, 248 N.Y. 626, 162 N.E. 551 (1928), the Court of Appeals had recognized claims grounded upon allegations of negligent supervision of infants in Longacre v. Yonkers R.R., 236 N.Y. 119, 140 N.E. 215 (1923), and Mangam v. Brooklyn R.R., 38 N.Y. 455 (1868). 44 App. Div. 2d at 139, 355 N.Y.S.2d at 444-45 (Hopkins, J., dissenting). Such a conclusion is of significance in view of the holding by the Court of Appeals in Gelbman v. Gelbman, 23 N.Y.2d 434, 245 N.E.2d 192, 297 N.Y.S.2d 529 (1969), that in abrogating the intrafamily immunity rule, the Court did not intend to create "liability where none previously existed." *Id.* at 439, 245 N.E.2d at 194, 297 N.Y.S.2d at 532. Sorrentino v. United States, 344 F. Supp. 1308 (E.D.N.Y. 1972), was also cited by Justice Hopkins as authortiy for the existence of a negligent supervision cause of action.

The majority in *Lastowski* did not directly analyze this line of argument. However, the Fourth Department in *Ryan* pursued the issue and found the cases cited by Justice Hopkins to be inapposite. *Longacre* and *Mangam*, it was observed, dealt with the duty of supervision owed by a parent not to his child, but to a third party. 43 App. Div. 2d at 433, 352 N.Y.S.2d at 287. *Sorrentino* was distinguished as being limited to *Dole* cases and therefore inapplicable to a direct suit by an infant against his parent. Additionally, the *Sorrentino* court relied upon Holodook v. Spencer, 73 Misc. 2d 181, 340 N.Y.S.2d 311 (Sup. Ct. Columbia County 1973), which was subsequently reversed by the Third Department. 43 App. Div. 2d 129, 350 N.Y.S.2d 199 (3d Dep't 1973).

236 44 App. Div. 2d at 142-43, 355 N.Y.S.2d at 448-49 (Hopkins, J., dissenting). Justice Gulotta also dissented from the *Lastowski* decision, but on a ground different from that advanced by Justice Hopkins. Justice Gulotta concluded that some form of a modified negligent supervision theory should be recognized as actionable. He suggested that the rule adopted in Goller v. White, 20 Wis. 2d 402, 122 N.W.2d 193 (1963), might present a "workable compromise between the need to preserve some freedom of action on the part of a parent and the need to protect the child." 44 App. Div. 2d at 150, 355 N.Y.S.2d at 455 (Gulotta, J., dissenting). In *Goller*, the Supreme Court of Wisconsin, in

Ryan and *Lastowski* indicate that where a suit or a counterclaim for *Dole* apportionment is predicated upon the alleged negligent exercise of parental supervision over a child, a court will disallow the action or counterclaim. Such a result is appropriate, since to permit such suits would result in a jury second-guessing the day-to-day conduct of the parent. Furthermore, in evaluating a parent's supervision of his child, no readily definable standards could be applied, inasmuch as the obligation of the parent is essentially moral.[237] Moreover, if the courts were to attempt to crystallize such an obligation, the result would be an interference with the freedom traditionally permitted a parent in the rearing of his offspring. The Second and Fourth Departments have wisely concluded that decisions concerning the supervision of children should remain with parents as a moral rather than legal duty.

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eliminating the parental immunity rule in that jurisdiction, excepted acts involving parental authority and the "exercise of ordinary parental discretion with respect to the provision of food, clothing, housing, medical and dental services, and other care." 20 Wis. 2d at 406, 122 N.W.2d at 198. Justice Gulotta conceded that the *Goller* rule would require further judicial refinement, particularly with respect to whether "other care" included negligent supervision, before it could be applied in New York. 44 App. Div. 2d at 151, 355 N.Y.S.2d at 456.

[237] Despite Justice Hopkins' suggestion in *Lastowski* that a "reasonable parent" standard could be used as the criterion for determining whether a parental duty to supervise has been breached, the three departments of the Appellate Division passing on the question have declined to impose such a standard. *See* Lastowski v. Norge Coin-O-Matic, Inc., 44 App. Div. 2d 127, 355 N.Y.S.2d 432 (2d Dep't 1974); Ryan v. Fahey, 43 App. Div. 2d 429, 352 N.Y.S.2d 283 (4th Dep't 1974); Holodook v. Spencer, 43 App. Div. 2d 129, 350 N.Y.S.2d 199 (3d Dep't 1973), *discussed in The Survey*, 48 ST. JOHN'S L. REV. 611, 650 (1974). Responding to Justice Hopkins' suggestion, Justice Shapiro observed in his majority opinion in *Lastowski*:

> [T]he fact is that his proposed standard, the "fictional" reasonable parent, is so "flexible" as to constitute no standard at all, depending as it would have to on innumerable variables such as the number and ages of the children and the differing economic, educational, cultural, ethnic, religious, physical, social and health background of the particular family involved.

44 App. Div. 2d at 136, 355 N.Y.S.2d at 442.